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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FABRIZIO BALESTRI, Plaintiff, v. CIT GROUP, INC., STUDENT LOAN XPRESS, INC., and DOES 1 to 30, inclusive, Defendants.	CASE NO: 08-CV-0846-JLS (JMA) NOTICE OF MOTION AND MOTION TO REMAND; POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on July 31, 2008, at 1:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 940 Front Street, Courtroom 6 - 3rd Floor, San Diego, California, plaintiff Fabrizio Balestri will and hereby does move the Court to remand this case to state court because there is no diversity of citizenship and removal of the case to federal court on that basis was improper.

This motion is based upon this Notice of Motion and Motion to Remand, the accompanying Memorandum of Points and Authorities in Support of Motion to Remand, the Declaration of Fabrizio Balestri in Support of Motion to Remand, including the exhibits attached thereto, all pleadings and papers on file in this action, and upon such other matters as may be presented to the Court at the time of the hearing.

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Dated: June 9, 2008

LAW OFFICE OF MICHAEL A. CONGER

By: s/Michael A. Conger
Attorney for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. Nature of the Litigation and Procedural Background

This litigation, filed in the Superior Court for the State of California, County of San Diego, on April 11, 2008, seeks recovery for breach of contract and waiting time penalties on behalf of plaintiff Fabrizio Balestri ("Balestri"), the former president and chief executive officer of Student Loan Xpress, Inc. ("SLX"), which provides student loans to college students.[1] According to the complaint, defendants SLX, and its parent, CIT Group, Inc., breached a three-year employment agreement and a retention bonus agreement by failing to pay Balestri amounts due under those agreements. Balestri alleged in his complaint that SLX has its "princip[al] place of business in San Diego, California." (Balestri Dec., Exh. A, ¶ 3.)

On May 9, 2008, the defendants filed their Notice of Removal of Action Under 28 U.S.C. § 1441(b). (Docket No. 1.) The basis asserted by the defendants for federal jurisdiction was the supposed complete diversity of citizenship between Balestri and defendants. (*Id*., pp. 2:11-3:2.) Although Balestri asserted in his complaint he is a citizen of California and that SLX has its principal place of business in San Diego, California, the defendants assert in their Notice of Removal that "SLX has . . . its principal place of business in the state of New Jersey." (Docket No. 1, p. 2:23-24.)

II. This Case Should Be Remanded Because Removal Was Improper.

A. The Complaint Does Not Support Diversity Jurisdiction.

"The diversity upon which removal is predicated must be complete (citation), and should generally be determined from the face of the complaint." (*Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985).) In his complaint, Balestri alleged: "SLX is a Delaware Corporation with princip[al] place of business in San Diego, California." (Balestri Dec., Exh. A, ¶ 3.)

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[1] The complaint is attached as Exhibit A to the Notice of Removal of Action Under 28 U.S.C. § 1441(b). (Docket No. 1, Exh. A.) The complaint contains two exhibits: Complaint Exhibit 1 is a three-year employment agreement between the parties dated January 4, 2005; Complaint Exhibit 2 is an amendment to the parties' agreement dated January 10, 2006. Because it appears the defendants e-filed the exhibits to the complaint out of order (Docket No. 1, pp. 9-21), to avoid possible confusion Balestri has attached a correct copy of his complaint, with its two exhibits, to his accompanying declaration as Exhibit A. ("Balestri Dec., Exh. A").

The Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction." (*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), citing *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988) and *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985).) "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." (*Gaus* at p. 566, citing *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).) Because defendants offered no evidence in support of their removal, other than an unsupported allegation that SLX has its principal place of business in New Jersey, the case should be remanded under *Miller* because Balestri's complaint alleges that SLX' principal place of business is in California.

B. There is No Complete Diversity of Citizenship Because SLX Has Its Principal Place of Business in San Diego, California.

1. SLX Has the Burden to Prove All Facts Necessary to Establish Diversity Jurisdiction.

"The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." (*Gaus*, *supra*, 980 F.2d at p. 566, citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712, n. 3 (9th Cir. 1990).) "The party asserting jurisdiction has the burden of proving all jurisdictional facts." (*Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092, citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).) "Plaintiff's motion for remand effectively forces the defendant—the party who invoked the federal court's removal jurisdiction—to prove by a preponderance of evidence whatever is necessary to support the petition: e.g. the existence of diversity [etc.]." (Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before Trial (The Rutter Group 2008) ("Schwarzer"), pp. 2D-216-217, ¶ 2:1093, citing *Gaus*, *supra*, 980 F.2d 564 at p. 566 and *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F.Supp. 993, 1000 (C.D. Cal. 2002).

2. A Corporation is a Citizen of a State Where it has its Principal Place of Business.

"Subject matter jurisdiction based upon diversity of citizenship requires that no defendants have the same citizenship as any plaintiff." (*Tosco Corp. v. Communities for a Better*

Environment, 236 F. 3d 495, 499 (9th Cir. 2001).) Balestri is a citizen of California (Balestri Dec., Exh. A, ¶ 1; Balestri Dec., ¶ 3), as conceded by defendants. (Docket No. 1, p. 2:17-19.) For purposes of determining whether diversity jurisdiction exists, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." (28 U.S.C. § 1332(c)(1).) "Thus, corporations are citizens of both the state where they are incorporated and the state where they have their principal place of business." (*Tosco* at p. 499.) Because the parties agree that SLX is incorporated in Delaware (Docket No. 1, p. 2:23-24; Balestri Dec., Exh. A, ¶ 3), the parties are diverse only if SLX' "principal place of business" is located in a state other that California.

"Federal courts generally use one of two tests to determine a corporation's principal place of business." (*Tosco*, *supra*, 236 F.3d at p. 500.) "First, the 'place of operations test' locates a corporation's principal place of business in the state which 'contains a substantial predominance of corporate operations.'" (*Ibid*., citing *Industrial Tectonics*, *supra*, 912 F.2d at p. 1092.) "Second, the 'nerve center test' locates a corporation's principal place of business in the state where the majority of its executive and administrative functions are performed." (*Tosco* at p. 500, citing *Industrial Tectonics* at pp. 1092-1093.) The two tests, however, are to be applied in a prescribed order of priority: "[W]here a majority of a corporation's business activity takes place in one state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state." (*Tosco* at 500.) "*The 'nerve center' test should be used only when no state contains a substantial predominance of the corporation's business activities*." (*Ibid*., italics in original.)

"The Ninth Circuit employs a number of factors to determine if a given state contains a substantial predominance of corporate activity, including the location of employees, tangible property, production activities, sources of income, and where sales take place." (*Tosco*, *supra*, 236 F.3d at p. 500, citing *Industrial Tectonics*, *supra*, 912 .2d at 1094.) In explaining why a corporation's citizenship is appropriate where it "has its greatest contacts with the public where it conducts most of its business," the court in *Industrial Tectonics* stated: "Activities such as employment of personnel, purchasing of materials, and sales of goods and services increase local familiarity with the corporation." (*Industrial Tectonics* at p. 1094.) "This local contact alleviates problems with local prejudice against outsiders and justifies consideration of the corporation as a citizen of that state." (*Ibid*.) "[C]onsidering a corporation to be a citizen of the state where it has the most public contact and greatest potential for litigation helps reduce the federal court diversity case load, which is a primary goal of the diversity statute." (*Ibid*.) "[O]ne must keep in mind that the purpose of diversity jurisdiction is to avoid the effects of prejudice against outsiders." (*Ibid*.) "Thus, the principal place of business should be the place where the corporation conducts the most activity that is visible and impacts the public, so that it is least likely to suffer from prejudice against outsiders." (*Ibid*.)

3. SLX' Principal Place of Business is in California Under the "Place of Operations" Test.

SLX has its principal place of business in San Diego, California. It was founded in 2002 as a subsidiary of Educational Lending Group, and was acquired by CIT in 2005. (See January 4, 2005 three-year employment agreement, Balestri Dec., Exh. A, Exh. 1; Balestri Dec., ¶ 4.) 146 of its 232 employees (62.9%) are employed in San Diego. (Balestri Dec., ¶ 5, Exh. B.) Although SLX has no manufacturing production activities, all of its sales and marketing activities are located in San Diego. (Balestri Dec., ¶ 6, Exh. B.) SLX printed, mailed, and approved tens of thousands of student loan applications annually from its San Diego headquarters. (Balestri Dec., ¶ 6.) Further, SLX' call center, which probably provides the most contact with the public of all of SLX' activities, is located in San Diego. (Balestri Dec., ¶ 7, Exh. B.) And SLX' marketing efforts, including responding to requests for bids or proposals from colleges and universities, always identified SLX as being based in San Diego. (Balestri Dec., ¶ 8, Exh. C.) SLX' accounting and human resources activities take place in San Diego. (Balestri Dec., ¶ 9, Exh. B.) Finally, SLX' key corporate officers all work from and reside in San Diego. (Balestri Dec., ¶ 10, Exh. D.) Thus, SLX has its principal place of business in California, under the "place of operations" test.

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4. SLX' Principal Place of Business is in California Under the "Nerve Center" Test.

SLX also has its principal place of business in San Diego, California, under the "nerve center" test. Balestri, SLX' former president and chief executive officer, was employed in and lives in San Diego. (Balestri Dec., ¶¶ 1, 3.) And of SLX' key executives are employed in and live in San Diego, including:

- LeeAnn Rohman, chief operating officer;
- Margaret Bazini, chief financial officer;
- David Beach, executive vice president and chief marketing officer;
- Gary Rohmann, executive vice president of business development;
- Travis Mottet, senior vice president, information and sales support;
- Donna North, senior vice president, human resources;
- Ken Guerrero, vice president, academic services;
- Nicole Casali Joseph, vice president, marketing;
- Daniel W. King, vice president, call center operations;
- Rick Nicols, vise president, telephony;
- Daniel Passov, vice president, online marketing; and
- Erin Guerrero, vice president, business development. (Balestri Dec., ¶ 10), Exh. D.)

Thus, SLX has its principal place of business in California, under the "nerve center" test.

III. Balestri Should Be Awarded Just Costs and Expenses Incurred as the Result of Removal.

On granting a motion for remand, the federal court may order the defendant to pay plaintiff his "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." (28 U.S.C. § 1447(c); see *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). The statutory purpose is to deter the possibility of abuse, unnecessary expense and harassment if a defendant removes improperly. (Schwarzer, *supra*, p. 2D-222, ¶ 2:1109; *Circle Industries USA, Inc. v. Parke Constr. Group, Inc.*, 183 F.3d 105, 109 (2nd Cir. 1999).)

In deciding whether an award is "just" under section 1447(c), the key factor is the propriety of the removal. The test is whether the removing party had "an objectively reasonable basis for removal." (*Martin*, *supra*, 546 U.S. at p. 136.) Here, defendants had no objectively reasonable basis for removal because SLX clearly has its principal place of business in California under both the place of operations and nerve center tests. Therefore, Balestri should be awarded just costs and expenses, including attorney fees.

IV. Conclusion

Based on the foregoing arguments and authorities, the motion to remand should be granted.

Dated: June 9, 2008 **LAW OFFICE OF MICHAEL A. CONGER**

By: s/Michael A. Conger
Attorney for Plaintiff

PROOF OF SERVICE

BALESTRI V. CIT GROUP, INC., et al.

United States District Court Case No. 08-CV-0846 JLS (JMA)

I declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 16236 San Dieguito Road, Suite 4-14, P.O. Box 9374, Rancho Santa Fe, California 92067.

On June 9, 2008, I served the foregoing document(s) described as:

1. NOTICE OF MOTION AND MOTION TO REMAND; POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND; and

2. DECLARATION OF FABRIZIO BALESTRI IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND;

on the interested parties in this action addressed as follows:

Max C. Fisher, Esquire Aimee G. Mackay, Esquire Brendan P. Sheehey, Esquire SIDLEY AUSTIN LLP 555 West Fifth Street, Suite 4000 Los Angeles, CA 90013-1010 (213) 896-6000 (213) 896-6600 (fax) mfischer@sidley.com amackay@sidley.com bsheehey@sidley.com	Attorneys for Defendants CIT Group, Inc., and Student Loan Xpress, Inc.

(X) BY ELECTRONIC MAIL - I caused said document(s) to be served electronically by CM/ECF to the addressee.

Executed on June 9, 2008, at Rancho Santa Fe, California.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Patricia B. Messer